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IN THE

Supreme Court of the United States

October Term, 1952

NO. 296

ALSTATE CONSTRUCTION COMPANY,
Petitioner

v.

MAURICE J. TOBIN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
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October Term, 1952
No. 296

Alstate Construction Company,
Petitioner

v.

Maurice J. Tobin, Secretary of United States Department of Labor

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254 (1).

OPINIONS BELOW

The opinion of the District Court is reported in 95 F. Supp. 844 and is also printed in the transcript of the record (R-7).

The opinion of the Court of Appeals appears in 195 F. 2d 577, and is also printed in the transcript of the record (R-66).

QUESTION PRESENTED

The question presented is:

Where an employer is engaged in the production, sale, distribution and application of a bituminous concrete material known as amesite, originating and used solely within the Commonwealth of Pennsylvania, in the repair and maintenance of highways, roads and streets over which interstate traffic moves, are those off-the-road employees who perform work essential to the production of the material "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended, 29 USCA, Section 201, et seq.?

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. § 201, et seq.), are set forth in the transcript of the record (R-56-59).

STATEMENT OF THE CASE

Respondent brought an action to enjoin Petitioner, Alstate Construction Company, a Pennsylvania corporation with its principal office at Harrisburg, Pennsylvania, from continuing alleged violations of the overtime and record-keeping provisions of the so-called Wage and Hour Law, viz., the Fair Labor Standards Act of 1938, Act of June 25, 1938, Chapter 676, 52 Stat. 1060, 29 U.S.C.A., Section 201, et seq., hereinafter called the Act. Respondent sought specifically to enjoin alleged violations of the provisions of Sections 15 (a) (2) and 15(a) (5) of the Act, 29 U.S.C. A., Section 215(a) (2 and 5). Those subdivisions of Section 15 provide that it shall be unlawful for any person to violate any of the provisions of Sections 206 or 207 as to minimum wages or overtime pay and Section 211(c) as to record-keeping. The bill charged no violations of Section 206 as to minimum wages.

Petitioner is engaged in the production, sale, distribution and application of a bituminous concrete material known as amesite. Petitioner's employees, facilities, and services are localized *solely* in the Commonwealth of Pennsylvania. Petitioner's three plants, located respectively in the counties of Adams, Mifflin and Schuylkill, produce amesite from exclusively local materials such as limestone, naphtha, asphalt filler and lime, manufactured and purchased or quarried in the Commonwealth of Pennsylvania. (Defendant has not

for several years received asphalt from Baltimore at its Adams County plant nor has it received at any of its plants any material from points outside of Pennsylvania.) This amesite, or bituminous concrete material, is also known as HE, a cold mix, and ID No. 2, a hot mix, otherwise known as macadam black top (R-8).

The said bituminous concrete materials are primarily marketed by Petitioner as follows:

(1) Contracts with the Commonwealth of Pennsylvania and many of its political subdivisions for the sale of material and for material and labor for constructing, reconstructing, resurfacing or repairing highways, roads and streets connecting with such highways, all of which are accessible to and regularly used by general vehicular traffic, including traffic moving between points in Pennsylvania and points in other states.

(2) Contracts with interstate railroad companies, commercial and industrial firms engaged in the production of goods for commerce, for sale of material and for material and labor to be used in the construction, reconstruction, repair or maintenance of roads, railroad crossings, parking areas and other facilities of such firms.

(3) Contracts with private persons and others having no interstate activity and not engaged in interstate commerce or the production of goods for commerce, for sale of material and for material and labor to be used in construction, reconstruction, repair and maintenance of road surface (R-8, 9).

During the period under consideration (June 30, 1945, through July 30, 1948), over eighty-five (85%) percent of the material was used in fulfillment of contracts referred to in categories (1) and (2) above.

Petitioner employs various classes of employees in its three plants and main office, including plant foremen, field foremen, equipment operators, laborers, semi-skilled laborers, truck drivers, mixers, firemen, watchmen and clerks. Equipment operators are engaged in operating such equipment as spreaders, graders, pavers, shovels, and rollers at times used directly in the work of constructing, repairing, or reconstructing the said highways and roads. Truck drivers are engaged in the following activities.

(1) Haul stone from the Bethlehem, Pennsylvania, quarry to the Hanover plant for use in the production of bituminous concrete materials.

(2) Haul the bituminous concrete materials from the Company's Naginey and Cressona plants to the job site.

(3) Haul the bituminous concrete materials from the Company's Naginey and Cressona plants to the job sites where the material is dumped into spreaders or pavers on the highway for application thereon.

(4) At the Hanover plant the Petitioner's truck drivers do some hauling of the bituminous concrete materials from the plant to the job site. Pennsylvania Department of Highways, in some instances, has accepted bids for the said material

F.O.B. plant, in which event the material is hauled from the plant to the job in Pennsylvania Highway Department trucks. For the most part, however, the trucking is performed by contract haulers, hauling from the plant to the job site, at an agreed price per ton, which is paid by the defendant (R-9, 10).

Laborers and semi-skilled laborers rake amesite on the highways, spread stone base and perform pick and shovel work on roads. At the plants, off-the-road employees, including mixers, firemen, watchmen, and clerks, are engaged in, or perform work incident to, the production of bituminous concrete materials (R-10).

Prior to the decision of the Court of Appeals, most of the employees of the Petitioner of the classes above described were regularly employed in excess of forty hours per week without payment of extra compensation at the time and one-half of their regular rate for such overtime hours. Wages are paid throughout the year to many of Petitioner's employees, including months during which Petitioner's plants do not operate and the employees do not work (R-10).

Prior to January 1, 1948, Petitioner at its main office and each of its plants, failed to keep proper records as required by Title 29, Chapter V, Code of Federal Regulations, Part 516. Since January 1, 1948, Petitioner has kept records showing occupation, day and time of beginning of work week, number of hours worked each day, and number of hours worked each week (R-10, 11).

There is no segregation of work performed by truck drivers at the Cressona or Naginey plants in the hauling of road mix produced at these plants for use on existing highways, public roads and streets from other hauling work performed by them; nor is there any segregation of work performed by the so-called off-the-road employees employed at the Company's three plants engaged in the production of road mix for use on existing highways, public roads and streets from other uses for which the road mix is produced (R-11).

Respondent contended that employees of the Petitioner, actually engaged in the construction, repair, reconstruction, extension and maintenance of interstate highways, public roads and interstate railroads which are regularly used for interstate transportation, are engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938; also, that employees engaged in manufacturing and hauling road mixes produced at Petitioner's plants for use on interstate highways are engaged "in the production of goods for commerce"; also, that truck drivers who haul raw materials or ingredients to defendant's plants producing road mixes for use on interstate highways are engaged "in the production of goods for commerce" (R-11).

Petitioner, while admitting that its employees actually working on the highway or other instrumentality of interstate commerce itself, applying amesite in the repair or maintenance thereof as distinguished from original construction, are within the protection of the Fair Labor Standards Act, contended that its employees engaged in the construction of new highways

and its off-the-road employees do not have such immediacy of participancy in interstate commerce as to bring them within the coverage of the said Act (R-11).

The District Court found "that the various plants of the defendant (petitioner) were all component parts of an integrated unit, eighty-five and one-half percent of whose total output was directed toward the improvement of various interstate facilities and that all of the employees of petitioner are definitely within the scope of the statute" (R-14). *There was no determination by the District Court as to whether petitioner's employees were engaged "in commerce or in the production of goods for commerce".*

Petitioner appealed to the United States Court of Appeals for the Third Circuit, which affirmed the District Court and held that "Alstate's off-the-road employees, in producing material which is used to repair and maintain the surface of instrumentalities of commerce are engaged in the production of goods for commerce." (R-69)

SPECIFICATION OF ERRORS

1. In holding that Petitioner's "off-the-road employees", in producing within a state, material which is used to repair and maintain surfaces of instrumentalities of commerce in the same state are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, as amended.

2. In affirming the judgment of the District Court which is so sweeping as to cover even those of Petitioner's employees whose activities are totally unconnected with interstate commerce.

ARGUMENT

I.

The contention that Petitioner's off-the-road employees are "engaged in the production of goods for commerce" finds no support from the language of the act, the legislative history and consideration of policy leading to its enactment or the interpretations placed thereon by the Administrator.

Without precedent, the decision below introduces a new theory for bringing employees within the coverage provision of the A ; namely, that even though the activities of such employees are strictly local in character and have no connection with the ultimate production of any commodity which in fact moves across state lines, nevertheless such employees are "engaged in the production of goods for commerce". This bold and startling concept finds no support from (a) a common sense view of the language of the Act, (b) the legislative history and considerations of policy leading to its enactment or (c) the interpretations placed upon the Act by the Administrator.

Throughout this case we have used the expression "off-the-road employees" to designate those of Petitioner's employees who are one or more steps removed from those employees who physically work on the instrumentality of commerce. The terminology is not original. E.g., *E. C. Schroeder Company, Inc. v. Clifton, et al.*, 153 F. 2d 385 (C.A. 10, 1946), cert. den., 328

U.S. 858, 66 S.Ct. 1351; *Walling v. Craig*, 53 F. Supp. 479 (D.C. Minn. 1943); *McComb v. Trimmer*, 85 F. Supp. 565 (D.C. N.J. 1949); *Thomas v. Hempt Bros.*, 371 Pa. 383, 89 A. 2d 776 (1952). We hold no particular brief for the expression except that it has proved to be a convenient shorthand means of referring to mixers, laborers and others engaged in manufacturing and hauling road mixes produced at Petitioner's plants and truck drivers employed to haul raw materials or ingredients to Petitioner's plants. We shall continue to use the expression herein.

At this point in our argument we are not concerned with Respondent's contention that the off-the-road employees are engaged "in commerce" as well as "in the production of goods for commerce".

(a) A common sense view of the language

In essence, Respondent urges that *production of goods for commerce* is synonymous with *production of goods for use by or in connection with instrumentalities of commerce.* Thus, in his memorandum submitted in response to the petition for certiorari in this case, he refers to the "popular understanding and dictionary definition" of the word "for" as including "to serve as, or as a part of; to supply the need of; in order to effect." It is to be noted, however, that such dictionary meanings appearing in *Webster's New International Dictionary*, 1948 Ed., p. 984, follow the broad introduction, to wit: "In the most general sense, indicating

that in consideration of which, in view of which, or with reference to which, anything is, is done or takes place." Which, of the scores of definitions listed therein for the preposition, was in the mind of Congress upon enactment of the Fair Labor Standards Act of 1938 must be determined from a consideratoin of the legislative history, administrative interpretation, and pronouncements by this Court. Thus, it would appear that in the *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451 (1941), this Court considered the use of the preposition in its most general sense when stating at page 113:

> "While manufacture is not of itself interstate commerce, the *shipment* of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce." (Emphasis supplied).

and at page 117:

> "The obvious purpose of the Act was not only to prevent the interstate transportation of the prescribed product but to stop the initial step toward transportation, production with the purpose of so transporting it."

But, whatever meaning may be attributed to the preposition "for", it is apparent that the Respondent is desirous of expanding the word "commerce" to mean "instrumentalities of commerce". Thus, in his memorandum, Respondent argues that since the "road material here is stipulated to have been produced, directly and specifically, 'for use in the construction, extension, repair, resurfacing, reconstruction, and maintenance

of existing [interstate] highways', it follows that its production is 'for commerce' within the plain ordinary meaning of the words." Such conclusion "follows" only if "commerce" and "instrumentalities of commerce" are synonymous! We submit they are not.

Section 2(a) of the Act, wherein the legislative findings are expressed, states that the existence of substandard labor conditions:

> "(1) causes *commerce* and channels and *instrumentalities of commerce* to be used to spread and perpetuate such labor conditions among the several states." (Emphasis added).

And in Section 3(b) the word "commerce" is defined as:

> "trade, commerce, transportation, transmission or communication among the several states or between any state or place outside thereof."

That Congress had *"instrumentalities of commerce"* in mind is obvious from Section 2(a) of the Act, and it is significant that it did not include the term in its definition of "commerce". Certainly, if it had wished to include "instrumentality of commerce", it would have done so.

Circuit Judge Bratton in *E. C. Schroeder Company, Inc. v. Clifton*, 153 F. 2d (C.A. 10 1946), cert. den., 328 U.S. 858, 66 S. Ct. 1351, commented upon this very argument which was made in that case, stating:

> ". . . But the Act does not speak of the production of goods for an instrumentality of commerce as distinguished from commerce itself. The

> Act is to be accorded a liberal construction. But the function of the judicial interpretation of a statute is to bring out and give effect to that which is already in it, latent or otherwise. It is not to add new provisions, substantive or otherwise, which the legislative tribunal in the exercise of its permitted choice omitted or withheld. If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality of commerce, it certainly would have employed apt words to express the intention. We fail to find anything in the language of the Act or its legislative history which lends support to the view that Congress purposed to bring workmen of that class within the coverage."

And, Judge Bratton's conclusion was adopted by Judge Forman in *McComb v. Trimmer,* 85 F. Supp. 565 (D.C.N.J. 1949), at page 568.

(b) The legislative history and consideration of policy

This Court has considered the legislative history and consideration of policy at length in its earlier decisions relative to the Act: *U.S. v. Darby,* 312 U.S. 100, 61 S. Ct. 451 (1941); *A. B. Kerochbaum Co. v. Walling,* 316 U.S. 517, 62 S.Ct. 1116 (1942); *Walling v. Jacksonville Paper Co.,* 317 U.S. 564, 63 S.Ct. 332 (1943); *Overstreet v. North Shore Corporation,* 318

U.S. 125, 63 S.Ct. 494 (1943); *Roland Electric Co. v. Walling*, 326 U.S. 657, 66 S.Ct. 413 (1946).

On May 24, 1937, the bill (known as S. 2475 and H.R. 7200) was introduced by Senator Black, accompanied by a presidential message. 81 Cong. Rec. 4960-4961. President Roosevelt said: "Goods produced under conditions which do not meet rudimentary standards of decency should be contraband and ought not to be allowed to pollute the channels of interstate trade." Id. 4961. That he contemplated the ultimate movement of goods in interstate commerce is implicit in his caution that, "Although a goodly portion of the goods of American industry *move* in interstate commerce and will be covered by the legislation which we recommend, there are many purely local pursuits and services which no federal legislation can effectively cover. . . . The proposed Federal legislation should be a stimulus and not a hindrance to State action." (Emphasis added). Id. 4961.

The respective bills which were later to become entitled the "Fair Labor Standards Act of 1938" were referred to the Committee on Education and Labor in the Senate and to the Committee on Labor in the House. Joint hearings were had before these Committees June 2-5, 7-15, 21 and 22, 1937. Hearings on S. 2475 and H.R. 7200, 75th Cong., 1st Sess. It was reported to the Senate July 8, 1937, with amendments. Sen. Rep. No. 884, 75th Cong., 1st Sess. After full discussion it was passed by the Senate July 31, 1937, with amendments. 81 Cong. Rec. 7957. In that form it was referred to the Committee on Labor of the House, and was reported out August 6, 1937 (H. Rep. No. 1452, 75th

Cong., 1st Sess.), without significant changes as to coverage or exemptions. After debate, it was recommitted to the Committee on Labor December 17, 1937 (82 Cong. Rec. 1835), including particularly the substitution of a single Administrator in place of the Fair Labor Standards Board proposed in the original Bill. It was again reported favorably by the House Committee on Labor April 21, 1938, with amendments. H. Rep. No. 2182, 75th Cong., 3d Sess. After debate, it was passed by the House May 24, 1938. 83 Cong. Rec. 7449. It went to conference between the two Houses and was reported out of conference with several amendments in substantially its present form and the conference reports were adopted in both Houses June 14, 1938.

One reads the reports of debate in the Congressional Record as well as the Committee Reports, hereinafter referred to, without finding a single suggestion that an employee engaged in the production of goods for "instrumentalities of commerce", as distinguished from "commerce", was intended to be covered. In fact, the idea of *movement of goods* across state lines is present throughout such debates and committee reports.

The original Senate Committee Report (Sen. Rep. No. 884, 75th Cong., 1st Sess.) states: "The bill carefully excludes from its scope business in the several states that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce." Id. page 5. It is to be noted that the

bill was then designed to cover all employees, with certain specific exemptions, and prohibited sale or shipment in interstate commerce of any unfair goods. Further, it branded unlawful the employment of a person in the production of unfair goods intended to be sold or shipped in interstate commerce. Id. pages 7, 8. *Movement* of goods in interstate commerce was certainly contemplated.

The House Committee Report (House Rep. No. 1452, 75th Cong., 1st Sess.) recommending amendments to S. 2475, declared:

> "It (the bill) applies only to industries engaged in the production of goods for interstate commerce and directly affecting interstate commerce. It does not affect the purely local intrastate business." Id. page 9.

> "Prohibitions Relating to Interstate Commerce; Provisions

> Part III of the bill contains the provisions (1) barring from interstate commerce goods which were produced under substandard labor conditions set forth in the bill, (2) prohibiting the employment under substandard labor conditions of any employee engaged in interstate commerce, or in the production of goods intended for transportation in violation of the provisions of the bill, and (3) protecting interstate commerce from the effect of substandard labor conditions. This part also contains provisions relating to imports." Id. page 16.

The House Committee Report (House Rep. No. 2182, 75th Cong., 3d Sess.) considered the proposed wage and hour law which still was in the form covering persons employed in industries *affecting* commerce. There, in the committee's Summary and Explanation of provisions, it declares that, inter alia, "the States are unable to remedy the situation (i.e. substandard labor conditions) because goods which were *produced* under substandard labor conditions in one State may, protected by the failure of Congress to exercise its commerce power, *flow freely into another state* which attempts to maintain fair labor standards." (Emphasis added). Id. page 7.

The Conference Report (House Rep. No. 2738, 75th Cong. 3d Sess.) adopted the Bill in its final form.

Judicial recognition of the legislative intent is found in the first case to reach this Court. In *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 454. There, Mr. Justice Stone said at page 109:

> "The Fair Labor Standards Act sets up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaraiton of policy in § 2(a) of the Act, and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st. Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess., Conference

Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states."

Also, at page 115:

"The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. McCray v. United States, 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; Sonzinsky v. United States, 300 U.S. 506, 513, 57 S. Ct. 554, 555, 81 L. Ed. 772, and cases cited. 'The judicial cannot prescribe to the legislative departments of the governmental limitations upon the exercise of its acknowledged power'. Veazie Bank

v. Fenno, 8 Wall. 533, 548, 19 L. Ed. 482. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress."

A later expression of legislative intent with reference to the Act accompanied the 1949 amendments. Apparently disturbed over the gradual extension of coverage through judicial interpretation, Congress re-defined the word "produced" to eliminate from the coverage of the Act those employees not employed "in any closely related process or occupation directly essential to the production thereof, in any State." (Sec. 203 (j)).

In this connection, the Schroeder case, supra, is of further significance. There, another question considered was the application of the Act to employees who were producing rock to riprap a dike built to protect an oil field from being flooded by a dam which had necessitated the relocation of the highway and railroad. Oil produced in that oil field moved in interstate commerce. The Court held that the employees producing the rock bore such a close and immediate tie to the integrated effort to effectuate the continued movement of oil in interstate commerce, that they were engaged in the production of goods for commerce and thus under the coverage provisions of the Act.

Congress expressly dealt with that situation in its restrictive amendments of 1949 to the Fair Labor Standards Act. The following conclusive statement appears in the House Managers' Report interpreting the Conference Report agreeing to amendments to the Fair Labor Standards Act, House Report No. 1453, 81st Congress, 1st Session, at page 15, under date of October 17, 1949:

> "The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production: * * *
>
> "2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded (Schroeder v. Clifton, 153 F. 2d (C.A. 10)); cert. den., 328 U.S. 858, 66 S. Ct. 1351."

It thus appears that Congress expressly considered the Schroeder case, restricted that branch of the decision which had applied the Act to quarry employees, and left stand the other portions of the decision, hereinbefore quoted, holding the Act inapplicable to employees quarrying rock and preparing local materials for use upon interstate transportation lines.

Thus, in determining the scope of the words "engaged in the production of goods for commerce", it

would appear that Congress has indicated an intent to restrict rather than liberalize the coverage provisions. E.g., *Tobin v. Pennington Winter Const. Co.*, 198 F. 2d 334, 337 (C.A. 10 1952).

(c) Interpretations placed upon the Act by the Administrator

The Administrator's interpretation of the coverage provision of the Act, adopted May 15, 1941, is revealing, for he and his staff were then in a better position than we are today to sense the intent of this administration-sponsored legislation. His Release G-162 categorically disclaims coverage of the same class of employees who are here being considered. Paragraph VI thereof states:

> "Employees engaged in producing materials such as sand, gravel, asphalt, concrete, macadam or railroad ties, to be used solely within the state in the construction, maintenance, repair or reconstruction of essential instrumentalities of commerce do not become subject to the Act merely by reason of the use to which such products are put. * * * Such employees are not 'engaged in commerce' since their operations are of a local nature and are distinct from the construction, repair and maintenance activities in which the materials are used. Neither are such employees engaged in producing goods for commerce."

In March of 1945 the Administrator completely reversed his position and by applying "The House That

Jack Built" technique, has endeavored to bring such off-the-road employees within the coverage of the Act as being engaged in the production of goods for commerce.

The foundation upon which the Administrator based his complete reversal of interpretation is the so-called "ice cases". It is submitted that the rationale of the "ice cases" is obviously not applicable to off-the-road employees who furnish materials locally for local use. *Chapman v. Home Ice Company of Memphis,* 136 F. 2d 353, 355 (C.A. 6 1943), cert. den. 320 U.S. 761, 64 S. Ct. 72; *Atlantic Co. v. Walling,* 131 F. 2d 518, 520 (C.A. 5 1942), affirming *Fleming v. Atlantic Co.,* 40 F. Supp. 654, 661 (N.D. Ga. 1951); *Hamlet Ice Co. v. Fleming,* 127 F. 2d 165, 167, 170 (C.A. 4 1942), cert. den., 317 U.S. 634, 63 S. Ct. 29. In the *Chapman* case Circuit Judge Simons cautioned that the ice cases were decided on the basis of their precise facts, saying:

> "We are not unmindful of the fact that a rationalization based upon the doctrine of necessity may under *'The House that Jack Built' technic,* lead to absurdity and end by ignoring all practical distinction between 'what is parochial and what is national.'" (Emphasis added).

In the Atlantic cases, the first of the so-called "ice cases", Circuit Judge Hutcheson stated that the question was:

> "* * * whether employees of defendant who are engaged in the manufacture, sale and deliveries of ice to the railroads, the Fruit Growers Express,

and to trucks for refrigeration of interstate freight shipments are covered by the Act * * *"

The precise question had been practically foreclosed by the well-known provision in Section 1(3) of the Interstate Commerce Act of 1887, as amended in 1906, 34 Statutes at Large, 584, Chapter 3591, 49 U.S.C.A., Section 1(3), pages 11 and 46, that interstate transportation includes:

"* * * all services in connection with the * * * refrigeration or icing * * * of property transported."

The initial ice case decision, *Fleming v. Atlantic Co.*, supra, at page 661, quoted and relied upon:

"* * * this statutory recognition of the interstate character and necessity of such icing service * * *"

In the *Hamlet Ice Company* case, supra, where it was conceded that:

"* * * the ice was bought for shipment to other states"

Circuit Judge Soper based the decision upon the fact that:

"* * * the cars iced at Hamlet are for the most part through freights, moving between Florida and New York. The Ice Company had knowledge at the time the ice is produced that it will move in interstate commerce."

In his opinion below Judge Kolodner recognized that the Administrator's assertion of coverage was

based upon the "ice cases". We submit that close scrutiny of those cases will disclose that they are no more stable as the supporting keystone of the Administrator's position than one would expect ice to be. The distinguishing fact in the "ice cases" which establishes their vital difference from this case is that in them the goods were transported in interstate commerce and were produced with the knowledge that they would be so transported.

II

Petitioner's off-the-road employees are not engaged "in commerce" nor are they so intimately related thereto as to be in practice and in legal contemplation a part of it.

The Court of Appeals ignored Respondent's argument that Petitioner's employees are engaged *in* commerce. He urges that under the cases of *Overstreet v. North Shore Corporation,* 318 U.S. 125, 63 S. Ct. 494 (1943); *Pedersen v. J. F. Fitzgerald Construction Co.,* 318 U.S. 740, 63 S. Ct. 558 (1943), modified and petition for rehearing denied, 318 U.S. 742, 63 S. Ct. 558 (1943); and *Fitzgerald v. Pedersen,* 324 U.S. 720, 65 S. Ct. 892 (1945), Petitioner's employees are so intimately related to interstate commerce "as to be in practice and in legal contemplation a part of it." Further, that the "practical considerations" are that their work is "vital to the proper functioning of these structures as instrumentalities" of commerce because without their service these instrumentalities would not

be open to the passage of goods and persons across state lines. *Overstreet v. North Shore Corporation,* supra, 318 U.S. 125, 63 S. Ct. 494 (1943), at pages 128-130.

However, it is to be noted that in *McLeod v. Threlkeld,* 319 U.S. 491, 63 S. Ct. 1248 (1943), this Court declined to accede to the argument that the conception of "in commerce" be extended *beyond* the employees engaged in actual work upon the transportation facilities. The cases relied upon below by the Respondent do not support this contention for extension of coverage. In *Ritch v. Puget Sound Bridge and Dredging Co.,* 156 F. 2d 334 (C. A. 9 1946); *Laudadio v. White Construction Co.,* 163 F. 2d 383 (C. A. 2 1947); and *Bennett v. Loftis Co.,* 167 F. 2d 286 (C. A. 4 1948), all cited heretofore by the Respondents as "a consistent line of decisions of the courts of appeals holding employees engaged in maintenance, repair and improvement of instrumentalities to be "in commerce"—the employees though physically off the instrumentality under consideration were working *on* a particular interstate facility or project in the sense of devoting their time and efforts to a particular facility or project. The end to be accomplished was the construction of the instrumentality itself. There is certainly no similarity between such a situation, and that with which we are here concerned. For example, Petitioner's employees who are employed in the mixing plant are not devoting their time and efforts toward the building or repair of some interstate facility; they are preparing a standard bituminous concrete mixture which may be used on public interstate roads, industrial parking lots, or private tennis courts.

The Administrator claimed no coverage under the "in commerce" provision in 1941, as indicated by Release G-162, supra, and, despite his pronouncements in this case, it would seem that the respondent has not at any time shown any real confidence in his position. In fact, Judge Forman, as late as July, 1949, in *McComb v. Trimmer*, supra, at page 567, refers to the fact that, "Obviously—and the plaintiff [McComb] *concedes* it—since the defendants' employees are not engaged directly upon, or associated with, any instrumentality of commerce itself, as in the foregoing cases, they are not engaged 'in' commerce". (Emphasis added) The "foregoing cases" are: *Overstreet v. North Shore Corporation*, 318 U.S. 125, 63 S. Ct. 494 (1943); *Pedersen v. J. F. Fitzgerald Const. Co.*, 318 U.S. 740, 742, 63 S. Ct. 558 (1943); *Walling v. McCrady Const. Co.*, 156 F. 2d 932 (C.A. 3 1946); *Walling v. Patton-Tully Transp. Co.*, 134 F. 2d 945 (C. A. 6 1943); *Bennett v. Loftis Co.*, 167 F. 2d 286 (C.A. 4 1948); and an oral opinion in *McComb v. Carter*, D.C. 8 W.H. Cases, 498.

In the instant case the government's attorneys likewise "conceded" before District Judge Follmer that Petitioner's off-the-road employees were not engaged "in" the production of goods for commerce.

And as recently as July 17, 1952, in *Tobin v. Johnson*, 198 F. 2d 130 (C.A. 8 1952) at page 132, Chief Judge Woodbrough said: "Plaintiff does not contend, *as he could not* in view of the decided cases, that defendants' employees are 'engaged in commerce' but only that they are 'engaged in the production of goods for commerce,' ". (Emphasis added).

III

Judicial expression has been overwhelmingly in support of Petitioner's position.

Inasmuch as this Court has granted certiorari in the case of *Adam Thomas v. Hempt Bros.*, 371 Pa. 383, 89 A. 2d 776 (1952) No. October Term, 1952 and will hear argument thereon immediately following this case, we shall not discuss in detail the opinion of the Supreme Court of Pennsylvania. We do, however, suggest that the opinion of Mr. Justice Jones of that court constitutes a well-reasoned critique of the opinion of Judge Kalodner.

In addition to the opinion in the *Hempt Bros.* case, supra, which reflects the views of the Petitioner herein, we respectfully refer to other judicial expression which has been overwhelmingly in support of our position:

Walling v. Craig, 53 F. Supp. 479 (D.C. Minn. 1943) which involved off-the-road employees who operated bituminous plants;

Wiley v. Stewart Sand and Material Co., 206 S.W. 2d 362 (Kans. Cy. C. A. Mo.), which involved employees who produced rock for use upon the highways and railroad beds within the State of Missouri;

Crabb v. Welden Bros., 65 F. Supp. 369 (S. D. Iowa 1946), which involved employees of a com-

pany quarrying and processing stone for use in repair and maintenance for interstate highways;

E. C. Schroeder Company, Inc. v. Clifton, et al., 153 F. 2d 385 (C.A. 10 1946), cert. den., 328 U. S. 858, 66 S. Ct. 135 (Judge Bratton's opinion), with reference to quarry workers quarrying rocks for use upon interstate transportation lines, both railroads and highways;

McComb v. Trimmer, 85 F. Supp. 565 (D.C. N.J. 1949), which involved employees of a company quarrying and processing stone for use in repair and maintenance of interstate highways;

Barbe v. Cummins Construction Company, 49 F. Supp. 168 (D.C. Md. 1943); involving employees of a concrete mixing concern which produced no goods which are shipped across state lines;

Ramos v. Puerto Rico Cement Corporation, Civil Case No. 4583, 10 C.C.H. Labor Cases, 63000 (March 1, 1946), involving employees who produced cement which was used by others in the repair and maintenance of instrumentalities of interstate commerce.

Further, bearing in mind that Congress rejected coverage in industries *affecting* interstate commerce in favor of the more restricted coverage provisions, it is significant that the Labor Management Relations Act, 1947, June 23, 1947, C. 120, Sec. 1, 61 Stat. 136; 29 USCA 141, which governs industries which "*affect*" commerce and which has been generally recognized as an expression of the widest extension of the commerce

power, has not been applied to intrastate activities such as those of Petitioner's off-the-road employees. The National Labor Relations Board has refused to entertain jurisdiction in cases dealing with operations essentially local in character: *Harvey M. Hanawalt, d/b/a Hanawalt Brothers,* Dec 16, 1948, case No. 21-RC-459, 80 N.L.R.B. No. 196; *D'Harris Brick and Tile Co.,* March 3, 1949, case No. 39-RC-23, 81 N.L.R.B. No. 173; *Okeelanta Sugar Co-Operative,* March 9, 1949, case No. 10-RC-373, 81 N.L.R.B. No. 200.

IV

The sweep of the injunction as affirmed by the court below is too broad.

The Court below answered the Petitioner's objection that the sweep of the injunction is too broad by referring to the language of the injunction. But, if Petitioner is to be guided by the language of the decision of the District Court as to which of its employees are covered by the Act, it is confronted by the sweeping assertion that since "eighty-five and one-half percent" of its "total output was directed toward the improvement of various interstate facilities, all of the employees of the Defendant [Petitioner] are definitely within the scope of the statute."

As was contended before the Court of Appeals, we believe that the fundamental error in the opinion of the District Court lies in the fact that the Court chose to view Petitioner's over-all operation rather than

focus its inquiry upon the work performed by the individual employee: *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S. Ct. 332 (1943) at page 337. District Judge Follmer said *all* of Alstate's employees were covered at a time even though he found, for example, that at the Naginey Plant, approximately twenty (20%) per cent of the output went into private work (R-9). Did Judge Follmer mean that, even those employees who worked on private work during a work week were covered? Should the Petitioner be obliged to act at its peril in determining which of his employees are engaged in interstate commerce or in the production of goods for commerce, *within the meaning of the Act?* District Judge Follmer's opinion, we believe, is susceptible of interpretation that, since eighty-five and one-half per cent of the total output goes into interstate facilities, *all employees* of Alstate are covered *all* of the time. We do not believe that such a conclusion was intended or would be legally sound, but we do contend that the opinion erroneously suggests a wide departure from the Act and cases decided thereunder which require that the determination of coverage be made upon an individual employee basis.

CONCLUSION

The present effort by the Respondent to extend the scope of the Fair Labor Standards Act of 1938 cannot be supported by the actual language of the statute, the legislative history and underlying considerations, the interpretations and rulings of the Ad-

ministrator, or the overwhelming judicial expression relating thereto.

We are not here concerned with an *exemption* from coverage; we are considering the basic question of *coverage* itself. On that issue, we submit that Chief Judge Woodbrough in *Tobin v. Johnson,* 198 F. 2d 130 (C.A. 8 1952), erred in relying apparently upon Mr. Justice Murphy's statement from *A. H. Phillips, Inc. v. Walling* 324 U.S. 490, 65 S. Ct. 807 (1945), that:

> "The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' * * * Any *exemption* from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of the statutory language and the intent of Congress." Id. 493.

Here, the "plain meaning of the statutory language and the intent of Congress" with reference to coverage of Petitioner's employees leave no room for doubt. From a physical standpoint, purely local business is involved and the product of the labor neither moves in interstate commerce nor does it have that immediacy of participancy in interstate commerce as to bring Petitioner's employees within the coverage of the Act.

The language of this Court in *Western Union Telegraph Co. v. Lenroot,* 323 U.S. 490, 508, 65 S. Ct. 325 (1945), while involving another point, is particularly appropriate:

"But had it (Congress) determined to reach this employment, we do not think it would have done so by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process. After all this law was passed as the rule by which employers and workmen must order their daily lives. To translate this Act by a process of interpretation to an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation."

The judgment should be reversed.

Respectfully submitted,

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